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No. 81-2276

In the Supreme Court of the United States

OCTOBER TERM 1982

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

Brief of Petitioner Truckee-Carson Irrigation District

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QUESTIONS PRESENTED

I

Whether, in a comprehensive water rights adjudication, adversity of claims must appear on the face of the pleadings before the doctrine of res judicata/collateral estoppel can be asserted as a bar to relitigation of the same claims in subsequent actions.

II

Whether the Secretary of the Interior is authorized to negotiate and settle property disputes between Indians and others, or whether, instead, he must litigate them to final judgment.

PARTIES TO THE ACTION

This action involves more than seventeen thousand individual parties, including several thousand landowners who are represented by petitioner Truckee-Carson Irrigation District. These parties have been listed in a filing submitted to this Court by the State of Nevada, which filing accompanied its petition for certiorari in this case, No. 81-2245. Petitioner Truckee-Carson Irrigation District hereby adopts and incorporates herein the list of parties submitted by the State of Nevada.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Action	i
Table of Contents	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
A. Proceedings Below	3
B. Facts Surrounding the Orr Ditch Litigation and Judgment	5
1. Creation and Purpose of Pyramid Lake Indian Reservation	5
2. The Newlands Project	6
3. The Orr Ditch Litigation	7
a. Filing of Complaint Through Entry of Temporary Restraining Order	7
b. The Truckee River Agreement and Entry of Judgment Pursuant Thereto	9
4. Western Nevada's Reliance on the Orr Ditch Decree	12
5. The Pyramid Lake Cutthroat Trout Fishery	13
C. The Determinations Below	15
1. The Trial Court Decision	15
2. The Ninth Circuit Decision	16
Summary of Argument	18

Page

Argument 21

I. THE PRINCIPLES OF RES JUDICATA/ COLLATERAL ESTOPPEL BAR THE CLAIM OF THE UNITED STATES AND THE TRIBE TO ADDITIONAL TRUCKEE RIVER WATERS 21

A. Pleading Adversity Is Unnecessary Where, As Here, Factual Adversity Is Established By The Record 22

B. Adversity Of All Claims Is Inherent In Comprehensive Water Rights Adjudications 25

C. The Ninth Circuit's Requirement of Explicit Adversity On The Pleadings Threatens The Finality Of Comprehensive Water Right Adjudications By Establishing An Impossible Standard For The Representation Of Multiple Interests By The United States 31

D. The Ninth Circuit's Decision Ignores Principles Of Modern Preclusion Doctrine Which Prevent Relitigation Of Disputes 34

1. Collateral Estoppel Prevents Relitigation Of The Amount Of The Reservation's *Winters* Doctrine Entitlement 35

2. Modern Preclusion Principles Prevent Relitigation Of Disputes Which Parties With Incentive Have Had A Full And Fair Opportunity To Litigate 36

3. In Comprehensive Water Right Adjudications, Such As *Orr Ditch*, All Parties Have Ample Incentive To Litigate Each Claim To The Hilt 41

II. THE NINTH CIRCUIT MISAPPLIES A RULING OF THIS COURT IN HOLDING THAT THE SECRETARY OF THE INTERIOR WAS NOT AUTHORIZED TO NEGOTIATE AND EXECUTE AN OUT OF COURT SETTLEMENT OF DISPUTED INDIAN WATER RIGHTS 42

Conclusion 49

TABLE OF AUTHORITIES

Cases

Page(s)

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) 23, 39
Agnew v. Brall, 124 Ill. 312, 16 N.E. 230 (1888) 45
Allen v. Hussey, 101 Cal.App.2d 457, 225 P.2d 674 (1950) 45
Allen v. McCurry, 449 U.S. 90 (1980) 37
Arizona v. California, 373 U.S. 546 (1963) 30

Blanchar v. City of Casper, 81 F.2d 452 (10th Cir. 1936) 45
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 19, 36, 37
Board of Com'rs. v. Blythe, 163 La. 929, 113 S. 150 (1927) 45
Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) 40

Cambist Films, Inc. v. Duggan, 475 F.2d 887 (3d Cir. 1973) 38
Cappaert v. United States, 426 U.S. 128 (1976) 30
Chicago, Rock Island and Pacific Railway Co. v. Schendel, 270 U.S. 611 (1926) 18, 23
City of Logansport v. Dykeman, 116 Ind. 15, 17 N.E. 587 (1888) 45
Colorado River Water Conser. Dist. v. United States, 424 U.S. 800 (1976) 34
Commissioner v. Sunnen, 333 U.S. 591 (1948) 22
Commonwealth v. Southern Pac. Co., 134 Ky. 421, 120 S.W. 313 (1909) 46
County of Lancaster v. Philadelphia Electric Co., 386 F. Supp. 934 (E.D.Pa. 1975) 38
Cuyler v. Sullivan, 446 U.S. 335 (1980) 19, 30

Page(s)

Farnham v. City of Lincoln, 75 Neb. 502, 106 N.W. 666 (1906) 46
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 37
Fowler v. Wolff, 479 F.2d 338 (8th Cir. 1973) 38
F.T.C. v. Manager, Retail Credit Co., Miami Br. Off., 515 F.2d 988 (D.C. Cir. 1975) 48

Gambocz v. Yelencsics, 468 F.2d 837, (3d Cir. 1972) 38
Gering v. School Dist. No. 28, Cass County, 96 Neb. 219, 107 N.W. 250 (1906) 46
Gerrard v. Larsen, 517 F.2d 1127 (8th Cir. 1975) 39
Gogerty v. Coachella Valley Junior College Dist., 57 Cal.2d 727, 371 P.2d 582 (1962) 46

Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975) 40

Ickes v. Fox, 300 U.S. 82 (1937) 6, 19
In re Waters of Long Valley Creek Stream System, 25 Cal.3d 339, 599 P.2d 656 (1979) 31
Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978) .. 40

Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683 (1895) 39
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 47

Mars v. McDougal, 40 F.2d 247 (10th Cir. 1930) 46
McKennie v. Charlottesville & A. Ry. Co., 110 Va. 70, 65 S.E. 503 (1909) 45
Metros v. United States Dist. Court for Dist. of Colo., 441 F.2d 313 (10th Cir. 1971) 40
Midcontinent Broadcasting v. Dresser Industries, 669 F.2d 564 (8th Cir. 1982) 39
Montana v. United States, 440 U.S. 147 (1979) 22

Page(s)

Morgan v. Udy, 58 Ida. 670, 79 P.2d 295 (1938) 18, 27
Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945) 45

Nashville, Chattanooga, & St. Louis Ry. Co. v. United States, 113 U.S. 261 (1885) 39-40
Nathan v. Tenna Corp., 560 F.2d 761 (7th Cir. 1977) .. 40
Northern Paiute Tribe v. United States, 30 Ind.Cl. Comm. 210 (1973) 14-15

Oakman v. City of Eveleth, 163 Minn. 100, 203 N.W. 514 (1925) 45
O'Connell v. Pacific Gas & Electric Co., 19 F.2d 460 (9th Cir. 1927) 45
Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 20, 46-47

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 36, 37
Prosise v. Haring, 667 F.2d 1133 (4th Cir.), *cert. granted*, 51 U.S.L.W. 3287 (1982) 40
Prout v. Inhabitants of Fire-Dist. of Town of Pittsfield, 154 Mass. 450, 28 N.E. 679 (1891) 45
Pueblo of Picuris v. Abeyta, 50 F.2d 12 (10th Cir. 1931) 34, 46

Ruskay v. Jensen, 342 F.Supp. 264 (S.D.N.Y. 1972) 38

Sampson v. Ampex Corp., 478 F.2d 339 (2d Cir. 1973) 40
Schaefer v. Berinstein, 140 Cal.App.2d 278, 295 P.2d 113 (1956) 46
Shipp v. Rodes, 219 Ky. 349, 293 S.W. 543 (1927) 46
Siegel v. National Periodical Pub., Inc., 508 F.2d 909 (2d Cir. 1974) 40
State v. Davis, 11 S.D. 11, 75 N.W. 897 (1898) 45

Page(s)

The Town of Petersburg v. Mappin, 14 Ill. 193 (1852).. 45

United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) 43, 44-45
United States v. California & O. Land Co., 192 U.S. 355 (1904) 19, 29
United States v. New Mexico, 438 U.S. 696 (1978) 32
United States v. Rubin, 243 F.2d 900 (7th Cir. 1957) 40
United States v. Title Insurance and Trust Co., 265 U.S. 472 (1924) 22, 35

Wagner v. City of Milwaukee, 180 Wis. 640, 192 N.W. 994 (1923) 45
Washburn County v. Thompson, 99 Wis. 585, 75 N.W. 309 (1898) 45
Webb v. City of Meridian, 195 So.2d 832 (1967) 45
Whitebird v. Eagle-Picher Company, 390 F.2d 831 (10th Cir. 1968) 46
Winters v. United States, 207 U.S. 564 (1908) 3

STATUTES

25 U.S.C.:
Section 2 .....2, 20, 44, 45, 48
Section 9 .....2, 20, 44, 45, 48
Sections 461-479 .....9, 47, 48
28 U.S.C. ¶ 1254(1) 2
43 U.S.C. ¶ 383 26
33 Stat. 189, 225 (1903-1905) 9

RULE

Rules of The Court, Rule 17.1 2

OTHER AUTHORITIES

Page(s)

2 Clark Waters and Water Rights ¶ 118.2 (1967) 6, 19

5 Clark Waters and Water Rights ¶ 409 (1972) 25

6 Clark Waters and Water Rights ¶ 513.1 (1972) ..18, 19, 25

Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485 (1974) 39

One-Third of the Nation's Land, Report to the President and the Congress by the Public Land Law Commission (1970) 31

Reserved Water Rights for Federal and Indian Reservations: *A Growing Controversy in Need of Resolution,* Report to Congress by the Comptroller General of the United States (1978) 14, 31, 32, 37

Restatement (Second) of Judgments, 8-10 (1982) 35

Restatement (Second) of Judgments, Intro. Note to ¶ 27 Comment c (1982) 35

Restatement (Second) of Judgments, ¶ 49 (1982) 37

J. Townley, *Turn This Water Into Gold: The Story of the Newlands Project* (1977) 12

Vestal, The Restatement (Second) of Judgments: *"A Modest Dissent,"* 66 Cornell L. Rev. 464 (1981) .. 39

Water and Power Resources Service, *Project Data* (1981) 12

Water Policies for the Future, Final Report to the President and Congress of the United States by the National Water Commission (June 1973) 33

18 Wright, Miller & Cooper, *Federal Practice and Procedure; Jurisdiction* ¶ 4407 (1981) 37

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 649 F.2d 1286. App. A-1. The January 5, 1982, Order of the Court amending its decision is reported at 666 F.2d 351. App. A-66. The decision of the District Court, embodied in its Memorandum Decision and its Findings of Fact and Conclusions of Law entered December 12, 1977, was not published; it is reproduced in the Appendix. App. A-72, A-94.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 15, 1981, and amended by its order of January 5, 1982. Petitions for rehearing were denied by order of the Court of Appeals

filed March 11, 1982. A petition for certiorari, Pet. No. 81-2276, was filed June 9, 1982, and certiorari was granted by this Court on October 12, 1982. This Court has jurisdiction under 28 U.S.C. 1254(1) and Rule 17.1 of this Court.

STATUTORY PROVISIONS INVOLVED

One of the issues raised by this case concerns the extent of the Secretary of the Interior's authority to manage federal property held in trust for the Indians. The following statutes are involved in that issue:

25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

STATEMENT OF THE CASE

This case involves the rights to the waters of the Truckee River, a major stream which originates in the Sierra Nevada mountains of California and Nevada. The Truckee flows out of Lake Tahoe through California for a distance, continues through the arid Western Nevada Desert past the cities of Reno and Sparks, and finally terminates in Pyramid Lake, a large desert lake with no outlet. JA 511, RT 2154-2157. Pyramid Lake is located in the Pyramid Lake Indian Reservation (hereinafter referred to as "the Reservation"), a reservation established by Executive Order

for the benefit of the Pyramid Lake Paiute Tribe of Indians (hereinafter referred to as "the Tribe"). Upstream from the Reservation, the waters of the Truckee River are used by the Sierra Pacific Power Company to generate electric energy; by the residents of Reno and Sparks for domestic and municipal purposes; by hundreds of irrigators on the Truckee River; and by several thousand farm families for irrigation, stockwatering, and domestic purposes on the 73,002 acre Newlands Project, the first federal reclamation project authorized after passage of the 1902 Reclamation Act.

A. Proceedings Below

This litigation was commenced in 1974 by the United States, on behalf of the Tribe, to assert a *Winters* doctrine reserved water right[1] to Truckee River flows sufficient to stabilize Pyramid Lake's water surface elevation and to sustain a naturally spawning fishery in the lake and the lower reaches of the river. The amount of entitlement asserted was 375,000-400,000 acre-feet annually, more than the entire natural flow of the river in many years. Nev. App. 152a; Exh. U-577, pp. 7-8, RT 773. For this right, the United States asserted a priority date of 1859, one of the earliest on the entire river. To establish this asserted right, the United States joined as defendants all of the other known diverters of Truckee River flows in Nevada, including the State of Nevada, the Sierra Pacific Power Company, the Washoe County Water Conservation District, the Cities of Reno and Sparks, some 17,000 indi-

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1. In *Winters v. United States*, 207 U.S. 564 (1908), this Court held that in establishing the Fort Belknap Indian Reservation, the federal government had impliedly reserved sufficient rights to water from the river running through the reservation to accomplish the purposes of the reservation. Thus, the water rights appurtenant to federal reservations are referred to as "*Winters* doctrine rights" or "reserved water rights."

viduals, and the Truckee-Carson Irrigation District, petitioner herein (sometimes hereinafter referred to as "TCID" or "the District").[2]

The defendants asserted that the United States was barred by res judicata/collateral estoppel from claiming additional water from the Truckee because in 1944 final judgment had been entered in an earlier comprehensive adjudication of the water rights in the Truckee River, *United States v. Orr Water Ditch Co.*, Equity No. A-3, in the United States District Court for the District of Nevada (hereinafter referred to as "*Orr Ditch*").

In response, the United States contended that because it had asserted the rights of both the Pyramid Lake Indian Reservation and the Newlands Reclamation Project in *Orr Ditch*, its representation of the Tribe had been inadequate, with the result that the United States was neither bound by the *Orr Ditch* Final Decree nor prohibited from claiming a right to additional water in this later, separate action. The Tribe, plaintiff-intervenor, additionally contended that a *Winters* doctrine right for fish flows was a separate cause of action from a *Winters* doctrine right for other purposes. Therefore, the Tribe argued, because a separate claim for fish flows had been neither asserted nor litigated in the prior action, the instant claim for additional water was not barred.

The trial of this action was bifurcated. The first phase addressed the issue whether the 1944 *Orr Ditch* final judgment operated to raise the bar of res judicata/collateral

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2. On motion by the United States, the District Court certified the thousands of Newlands Project farmers as a class, and directed that TCID represent their interests. JA 193-206. Accordingly, the United States was not required to name and serve those farmers individually.

estoppel against the United States' attempt to seek additional water for the Reservation in this litigation some thirty years later. If the United States were not so barred, the second phase would determine the remaining issues. As discussed more fully below, the District Court upheld the defendants' preclusion defense and ordered the action dismissed. The Ninth Circuit affirmed the trial court's decision as to all defendants but TCID. As to TCID, the Ninth Circuit held the *Orr Ditch* judgment did not preclude the United States or the Tribe from relitigating their claim for Truckee River waters.

B. Facts Surrounding The Orr Ditch Litigation and Judgment

1. CREATION AND PURPOSE OF PYRAMID LAKE INDIAN RESERVATION

During the forty-one days of trial on the preclusion defense, the evidence established the following facts. The Reservation was set aside in 1859 and confirmed by Executive Order of the President in 1874. The District Court found:

> (3) That the primary purpose for the creation of this Paiute reservation was in furtherance of the then existing national governmental policy of setting apart the various Indian tribes of the West on reservations on the public domain, conforming as nearly as possible to their historic areas of occupancy. That with respect to this Tribe there were several apparent subsidiary purposes for the creation of the reservation reflected in historic documents. It is not reasonably possible to rank these subsidiary purposes in the order of greatest importance as among them. However, they are found to be (1) to remove the tribal members from the emigrant trails to avoid conflict with the white settlers and travelers; (2) to provide agricultural and grazing lands in order to further the policy of teaching the

> Indians the pursuits of agriculture and animal husbandry, and thereby diverting them from their nomadic habits and customs and their dependence upon hunting and fishing as their sole sources of sustenance, and (3) to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance, at least in part, from these historic fisheries.

App. A-97, 98. By 1913, 612 Indians lived on the Reservation, and derived their sustenance, at least in part, from farming about 1,200 acres of Reservation land. JA 264-265, 273, RT 1042, 1059.

2. THE NEWLANDS PROJECT

In 1902, Congress enacted the Reclamation Act, authorizing construction of federally assisted irrigation projects in order to encourage settlement of the arid western states. Almost immediately the United States initiated its first reclamation project, the Newlands Project in Western Nevada, and filed for water rights from the Truckee River sufficient to irrigate 232,000 acres of land, including about 20,000 acres on the Reservation which could not be irrigated directly from the Truckee River. JA 265, RT 1042, 1059; Exh. B-475, pp. 26-27, 30, RT 361-362. On the Newlands Project today 73,002 acres of water right land are owned and farmed by some 2,000 project farmers. RT 7245-7247. The United States has conveyed to each project farmer the water right appurtenant to his land; thus the individual farmers, and not the United States, now own those water rights, Exh. B-533A-D, RT 7355-7357; RT 7245, which "cannot be withdrawn at the will of the Government." 2 Clark *Waters and Water Rights* § 118.2 at 183 (1967); *see also Ickes v. Fox*, 300 U.S. 82, 95 (1937).

3. THE ORR DITCH LITIGATION

a. Filing Of Complaint Through Entry Of Temporary Restraining Order

In order to secure the necessary water rights for the Newlands Project and for the Reservation, in 1913 the United States initiated the *Orr Ditch* case, which was to be a comprehensive adjudication of all of the water rights on the Truckee River in Nevada. JA 280-282, 285, RT 304-308, 420-422, 1040, 1042, 1059. The Amended Complaint filed by the United States in that action set forth separate and distinct water right claims for the Reservation and for the Newlands Project. Nev. App. 2a-11a. One governmental purpose for creating the Reservation and for reserving water for Reservation use was alleged to be to protect "the Indians and their descendants in their homes, fields, pastures, fishing, and their use of said land and waters."[3] Nev. App. 6a-7a. The pleading averred that

> [u]ntil the *several rights* of the various claimants, parties hereto, including the United States, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of *each right* . . . has been judicially determined the United States cannot properly protect its rights . . . (Emphasis added.)

Nev. App. 10a. In its prayer for relief the United States asked the court to decree to it the rights [plural] set forth in the complaint. *Id.*

By order of the court, on motion of the United States, all parties were deemed bound as against all others without the necessity of filing formal cross-complaints. JA 310-312,

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3. It is clear from a careful reading of the Amended Complaint that the government intended, through the language quoted above, to assert the full measure of the Reservation's water right in the *Orr Ditch* litigation. *See also* JA 263, 269-270, 273-274, 276-277, 401-402, RT 248-249, 1042, 1059, 235. Both the District Court and the Ninth Circuit so found. App. A-6, A-100.

RT 357-358. In prosecuting the case, the United States represented the interests of both the Tribe and the farmers on the Newlands Project, separately presenting the water right claims of each. Exh. B-475, RT 361-362.

The Reservation's *Winters* doctrine claim was prepared and presented in consultation with, and with the assistance of the Department of Interior's Office of Indian Affairs, whose particular approval of the amount claimed on behalf of the Reservation was sought prior to trial by the Special Assistant U.S. Attorney in charge of the *Orr Ditch* litigation. JA 271, 276-277, 316, RT 248-249, 298-300, 303-304, 1042, 1059; Exh. B-23, RT 9162. The Reservation claim was specifically and vigorously opposed by virtually every other diverter on the river, JA 366-375, 400, RT 234-235, 370; Exhs. B-480-490, RT 368-374; Exh. B-515, RT 408, since it had one of the earliest asserted priority dates on the river. The private defendants challenged the amount of the Reservation's claimed right (which included water for acreage not yet irrigated), the priority date accorded the right (December 8, 1859), and even its very existence. JA 366-375, 399-401, RT 234-235; Exhs. B-480-490, RT 368-374.

The *Orr Ditch* defendants' objections to the 1902 appropriative right claimed for the Newlands Project were separately grounded and separately presented. They challenged primarily the amount of water and acreage claimed on behalf of the Project.[4] JA 366-375, 399-400, RT 234-235, 370; Exh. B-481, RT 369.

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4. Of 744 diversions adjudicated in *Orr Ditch*, only eight had an earlier priority date than the Reservation's. *See* Nev. App. 58a-141a. The right asserted on behalf of the Newlands Project bore a priority date later in time than, and thus junior to, all but twenty-nine of the 744 diversions adjudicated. Even appropriators with senior water rights, however, would have had an incentive to limit the scope of the Newlands right, in order to preserve the availability of water for any future appropriations they may have anticipated.

In 1926, the court accepted the report of the Special Master whom it had appointed to hear the case and, on his recommendation, entered a temporary restraining order declaring the parties' rights and leaving the decree open for possible modification during a trial period. Exh. A-99002, RT 231-232; JA 408-409, RT 234-235. For the Reservation the order established an 1859 priority date, allocated water for irrigation of 3,130 acres of bottomland, and provided for a conditional water right to irrigate an additional five acres of benchland per tribal member if, in the future, land were allotted to individual tribal members as then authorized by Congress.[5] For the Newlands Project, the court's order established a priority date of 1902 and authorized diversion of up to 1,500 cubic feet per second for irrigation of up to 232,000 acres with a water duty of 3.5 acre-feet per acre for bottomlands and 4.5 acre-feet per acre for benchlands. Following entry of the temporary restraining order, a court-appointed watermaster administered the river. JA 455, RT 9162; Exh. B-496, RT 382.

b. The Truckee River Agreement And Entry of Judgment Pursuant Thereto

It was several years before any further significant events occurred in the *Orr Ditch* case. In 1934, however, after a period of prolonged and severe drought, the major users on the river entered into negotiations to attempt a settlement of the case which would include development of additional usable yield through storage of winter flows. The four parties to the negotiations were the Sierra Pacific Power Company; the Washoe County Water Conservation Dis-

5. Section 26 of the 1904 Appropriations Act, the authorization for such allotments, *see* App. A-26, 27, was repealed in 1934, with the passage of the Wheeler-Howard Act, 25 U.S.C. §§ 461-479. No individual allotments of Reservation land were ever made.

trict; TCID, representing the rights of the Newlands farmers;[6] and the United States, representing solely the Tribe. Exh. B-316, RT 453-454; B-318, RT 9162; Exh. U-293, RT 1047, 1059.

The Bureau of Reclamation took no position concerning the substance of the proposed agreement, and specifically told TCID to negotiate directly with the Bureau of Indian Affairs concerning the extent of the negotiated Reservation right. JA 465-466, 469, RT 440-441, 9162. The Bureau of Indian Affairs negotiated an enlargement of the Reservation's rights from those decreed in the 1926 temporary restraining order, acquiring (a) an increase in water duty from 3.3 to 4.0 acre-feet per acre, Exh. A-461, RT 4583; and (b) an increase in the acreage covered to include an unconditional water right for five acres of benchland per Indian despite the recently enacted Wheeler-Howard Act's prohibition of further allotments. Exh. B-299, RT 446. TCID resisted these enlargements of the Reservation's rights, but the United States insisted upon them as a condition to execution of the settlement agreement and TCID ultimately acceded. Exh. A-467, RT 4583; Exh. G-29, RT 332-333; Exhs. U-293, 295, 296, RT 1047, 1059; Exh. B-337, RT 464-466.

The settlement agreement, or Truckee River Agreement as it came to be known, provided that the parties would stipulate to entry of a final decree in the *Orr Ditch* lawsuit consistent with the terms of the agreement, Exh. B-499, RT 385, and it provided that a Stipulation For Entry of Final Decree and Final Decree were to be deposited into escrow, to be filed in court in the *Orr Ditch* case only after

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6. The newly formed Truckee-Carson Irrigation District (TCID) had assumed operational control of the Newlands Project under an agreement with the United States dated December 18, 1926. Exh. B-492, RT 375-379.

completion of a new upstream storage reservoir contemplated by the agreement. *Id.*

The Truckee River Agreement was approved by the Secretary of the Interior on June 13, 1935, and was executed July 1, 1935, App. A-110, and it and the Stipulation For Entry of Final Decree with the Final Decree annexed thereto were deposited into escrow. *Id.* Secretary of the Interior Ickes then recommended to Congress that the necessary storage project be authorized, and he specifically advised Congress that its construction was a prerequisite to a stipulated settlement in the *Orr Ditch* case. Exh. B-35A-38A, RT 395.

The reservoir was authorized by Congress and completed in 1942, Exh. B-498, RT 383-384, and the Truckee River Agreement and Stipulation for Entry of Final Decree and the Final Decree were withdrawn from escrow and filed with the court. Exh. B-403, RT 349-350. A Motion for Entry of Final Decree was filed jointly by the United States, Washoe County Water Conservation District, Sierra Pacific Power Company and TCID. Exh. B-515, pp. 9-10, RT 408. Three days of hearings were held, during which some of the private defendants renewed their objections to the right proposed for the Reservation, both as to priority and amount. Exh. B-515, RT 408. The objections were overruled and the *Orr Ditch* Final Decree was entered on September 8, 1944. It provided, in part:

> *The parties,* persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns *and all persons claiming by, through or under them* and their successors, in or to the water rights or lands herein mentioned or described, *are* and each of them is hereby

> *forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree,...* (Emphasis added.)

App. A-247. No motion for a new trial was filed and no appeal was taken from the entry of this decree. Exh. 517, RT 409-410.

4. WESTERN NEVADA'S RELIANCE ON THE ORR DITCH DECREE

All parties to this action have conceded that "all facets of life and economy" in northwestern Nevada are dependent on the Truckee River's water, and that billions of dollars in improvements and investments have been spent in reliance on the certainty of water rights decreed in *Orr Ditch*. JA 258-259, RT 5120-5123. This reliance is shared by the Newlands farmers. The water right established by the *Orr Ditch* decree for the Newlands Project has been the foundation for the Project's successful realization of the goals and promises of the federal Reclamation Act. Upon it has been built an agrarian society of small family farmers who have populated a large expanse of desert and made it bloom. *See* J. Townley, *Turn This Water Into Gold: The Story of the Newlands Project* (1977). Approximately eight thousand people living on twelve hundred small farms rely directly on project water for irrigation, stockwatering, and their basic domestic needs. During non-drought years they directly produce about $13,000,000 worth of crops annually, principally alfalfa and grains, on farms which average sixty acres, Water and Power Resources Service, *Project Data*, at 684, 689, U.S. Gov't Printing Office (1981); and the multiplier effect of their contribution on the regional economy is undoubtedly far greater than this.

5. THE PYRAMID LAKE CUTTHROAT TROUT FISHERY

Beginning in about 1922, after the inception of the *Orr Ditch* litigation but well before entry of the Temporary Restraining Order therein, a decline in the Pyramid Lake fishery became apparent. By 1940, the cutthroat trout species indigenous to Pyramid Lake was extinct. RT 727, 2390, 4141-4142.[7] The record shows that even during the litigation of the *Orr Ditch* case the Office of Indian Affairs was aware of the problems of the fishery at Pyramid Lake and knew that the amounts claimed for the Reservation in *Orr Ditch* did not include fish flows. JA 323, 333-334, 337, 339, 472, RT 257-259, 262-265, 308, 1044, 1059, 4501, 4583; Exh. A-305, RT 263-265; Exh. A-50284B, RT 309; Exh. A-307, RT 257-259. Yet while the Bureau successfully sought an increase in the amount of water allotted to the Reservation for irrigation purposes, it never sought any water for fish flows.

After entry of the *Orr Ditch* Final Decree, a number of remedial actions designed to restore the Pyramid Lake fishery within the confines of the decree were authorized both by Congress and by local interests.[8] These efforts have

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7. Many factors contributed to the decline of the trout fishery, including (a) the dumping of sawdust from upstream lumber mills into the river, which formed an impassable delta at its mouth and prevented upstream spawning migration; (b) the insurmountable migration barriers which the Reservation's Numana Dam and the Project's upstream Derby Dam presented to fish; (c) the major diversions of flows for irrigation use upstream; (d) excessive fish harvesting by the Indians; (e) severe drought during 1929-1934; and (f) the refusal of the Indians to allow the State of Nevada or U.S. Bureau of Fisheries to take spawn on the Reservation for fish propagation. RT 4378-4380, 4390-4422, 4425-4436, 4538-4539, 4599-4602, 4608-4611, 4679, 4698-4700, 4955, 5542-5544, 5743-5747.

8. In approximately 1954 the State of Nevada commenced a program to develop a cutthroat trout fishery in Pyramid Lake; and in 1961 the State of Nevada, the United States and the Tribe entered into a cooperative agreement that had as its goal the restoration of the Pyramid Lake cutthroat trout fishery. RT 4156-4158, 5559-5562; Exh. A-1215L, RT 5562, 5565.

produced three fish hatcheries, one of which is located on the Reservation; Marble Bluff Dam and Fishway, which now enables fish to pass through the previously-impassable river delta; Stampede Reservoir, a major upstream storage reservoir from which waters are released for enhancement of fish flows below Derby Dam; and a fish ladder presently under construction at Numana Dam on the Reservation. RT 676, 735, 941-942, 1001-1002, 2086-2089, 2383-2384, 5926-5928. The United States alone has expended over $31,000,000 on fishery restoration. JA 509-510, RT 1017-1018.

These restorative efforts have been largely successful. A population of a related species of cutthroat trout has been introduced and established at Pyramid Lake. It now supports a fishery which sustains not only the Reservation's Indian population but a sizeable non-resident sport fishing demand as well.[9]

In addition, in 1950 the Tribe filed a claim with the Indian Claims Commission seeking compensation for destruction of its Pyramid Lake fishery due to the United States' taking of water and water rights. Exh. B-448, RT 7887. In the first phase of the proceedings the Tribe established, by unopposed motion, the government's legal duty to preserve the Pyramid Lake waters and fisheries. *Id.; Northern Paiute*

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9. The lake has been classified the fourth most important sport fishery in the State, and produces approximately $100,000 annually in revenues for the Tribe from sport fishing permits, boat launching, and camping fees imposed on non-resident sport fishermen. The sport fishing industry on the Reservation employs approximately forty tribal members full-time. *Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution*, Report to Congress by the Comptroller General of the United States at 35 (1978) [hereinafter "GAO Report"]. In 1970 the fishery supported 141,614 angler days of fishing on Pyramid Lake, and in 1975 the Tribe's records showed a success ("keeper") rate of .39 fish per hour. RT 755-756, 5570. A "keeper" is a fish more than 19½ inches in length. RT 755.

Tribe v. United States 30 Ind.Cl.Comm. 210 (1973). A settlement was then negotiated in which the Tribe agreed to accept $8 million for the loss of its claimed water up to 1975, and promised not to sue the United States for any additional damages should it be determined in this action that its reserved water right is limited to the amount specified in the *Orr Ditch* decree. JA 488-508, RT 7888-7897.

C. The Determinations Below

1. THE TRIAL COURT DECISION

Based on the facts described above, the District Court held that res judicata barred the United States and the Tribe from asserting a right to any additional water. In so holding, the court expressly found the following: (1) that the Tribe's reserved water right was a single cause of action; (2) that the government and the Tribe had alleged a right to water for fishery purposes in the *Orr Ditch* litigation; (3) that the government and the Tribe had had a full and fair opportunity to litigate the fishery matter in the earlier litigation but had not done so; and (4) that all defendants in the instant action were in privity with the defendants to the *Orr Ditch* case. *See* App. A-94-107. The court also concluded, without explanation, that collateral estoppel did not apply. See App. A-108.[10] The court then dismissed the complaint as to all defendants.

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10. These last two conclusions of the District Court inspire some speculation. First, it is clear from the record that neither the Newlands farmers nor subsequent appropriators were defendants in *Orr Ditch* or successors in interest to any such defendants, yet they were found to be "in privity" with those parties. As will be shown later in this brief, the expanded notions of privity, based on congruence of interest, may explain this conclusion. *See* p. 39, *infra*.

Second, the court described the fishery interest of the Tribe as "a *Winters* implied and reserved *water right* for fishery purposes," (emphasis added) App. A-104, after concluding that a *Winters*

(cont'd on p. 16)

2. THE NINTH CIRCUIT DECISION

The Tribe and the United States appealed the District Court dismissal of their action on several grounds, but the Ninth Circuit upheld the lower court's decision as to every litigant *except TCID*. In so holding, the court rejected the Tribe's argument that the asserted fishery right constituted a separate cause of action from the *Winters* doctrine right asserted on its behalf in *Orr Ditch*. App. A-31-34. Neither did the court find the government's representation of the Tribe in *Orr Ditch* to be either inadequate or lacking in the good faith required of a trustee/guardian acting in a representative capacity. It expressly found that due process would not be violated by enforcing the decree. App. A-68. The Ninth Circuit therefore accorded res judicata protection to the *Orr Ditch* defendants, their privies, and successors.

The court also extended claim preclusion to protect subsequent appropriators who had not been parties to the *Orr Ditch* proceedings. In so doing, the court relied heavily on the comprehensive nature of the adjudication which approximated a statutory *in rem* proceeding, on the just expectation of all concerned that every available claim and defense would be asserted, App. A-48-49, and on the heavy reliance which the government intended to and did induce on the finality of the decree. *Id.*

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10. (cont'd.)
doctrine right constitutes but a single cause of action. The terminology thus creates some confusion concerning the District Court's conclusion. If indeed the court had recognized, as its choice of words suggests, a distinct fishery *water right claim* which it found not to have been litigated, it would necessarily have denied res judicata effect to the prior judgment. Since the court did accord res judicata effect to bar litigation of the purported "fishery right," however, the obvious explanation is that the court found it to be a separate, unlitigated *issue*. This explanation comports with its holding that collateral estoppel does not apply. As shown below, TCID challenges the District Court's conclusion that a separate fishery "issue," complete with additional water entitlement, can be so described. *See* pp. 35-36, *infra*.

In order to distinguish between the *Orr Ditch* defendants and subsequent appropriators on the one hand, and TCID on the other, the Ninth Circuit decided that, despite the factual adversity between TCID's and the Tribe's interests which the record showed, the absence of "adversity *on the pleadings*" disqualified the Newlands farmers from invoking the preclusive effect of the litigation because "[n]either the court nor the government nor the Tribe nor TCID was ever put on notice that a binding judgment was intended between TCID and the Tribe." Such notice, according to the Ninth Circuit, "might have suggested to the Tribe that it must seek to intervene and to the court that intervention might be proper." App. A-69.

Finally, the court decided that the Secretary of the Interior had no authority to negotiate the Truckee River Agreement, at least insofar as that agreement and the final *Orr Ditch* decree based upon it "extinguish the Tribe's property interests." App. A-29 n. 10, and text accompanying. Thus with one blow the Ninth Circuit substantially disavowed the validity of the Agreement, and ignored, for res judicata purposes, the *actual* adversity between TCID and the Tribe which the Truckee River Agreement negotiations clearly evidenced.

SUMMARY OF ARGUMENT

The Ninth Circuit's denial of res judicata protection to the Newlands farmers alone, based on the absence of "explicit pleading adversity," ignores both the inherent nature of comprehensive water right adjudications and the history of the *Orr Ditch* litigation and settlement. Determination of adversity for purposes of res judicata is based upon an analysis of the relationship of the parties, not upon their alignment on the pleadings. *Chicago, Rock Island and Pacific Railway Co. v. Schendel*, 270 U.S. 611, 615 (1926). This is especially true in comprehensive water right adjudications, since in such actions all claims are necessarily adverse to all others. *Morgan v. Udy*, 58 Ida. 670, 681, 79 P.2d 295, 299 (1938). The actual adversity of the Reservation claim and the Newlands claim was amply demonstrated to all concerned by the good faith, arm's length settlement negotiations between the United States, representing solely the Tribe, and TCID, representing the Newlands farmers. The Truckee River Agreement was negotiated and entered into for the express purpose of settling, in the form of a binding final court decree, the water right claims of the signatory parties.

The Ninth Circuit decision not only ignores the nature of comprehensive water right adjudications, but also misconceives the character of Western water rights in general, by treating the United States' decreed rights in *Orr Ditch* merely as fungible parts of a unified whole which can be allocated and reallocated at will. But both the Reservation right and the Newlands right are separate and distinct rights which have been limited from their inception by the facts surrounding their creation. By their nature they cannot be expanded and contracted at will as the Ninth Circuit assumes.[6] Clark *Waters and Water Rights* § 513.1 at

302 (1972); *see also* 2 *id.* § 118.2; *Ickes v. Fox*, 300 U.S. 82, 95 (1937). As a result of this fundamental misunderstanding, the Ninth Circuit's decision would permit the United States to deliberately sacrifice an early priority date as to one water right claim, in order to avoid litigating adverse claims simultaneously. This is an assumption of bad faith which courts should avoid where possible. *See United States v. California & O. Land Co.*, 192 U.S. 355, 360 (1904). The contrary assumption, that the United States asserted each claim to the maximum extent in good faith, would neither violate due process, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), nor detract from the fully adversarial litigation of each claim.

The Ninth Circuit's requirement of pleading adversity frustrates the clear federal policy of encouraging comprehensive water right adjudications. First, under its holding, such pleadings would create notice of a due process violation which would vitiate the decree. Second, no mechanism exists, in most situations, to permit the United States to relinquish control of the litigation and prosecution of its inherently adverse claims. Thus, under the Ninth Circuit's decision, it is impossible to obtain the finality and certainty of water rights essential to planning and economic stability.

The dilemma created by the Ninth Circuit's holding is an unnecessary one, however, because it arises solely from the court's failure to recognize that all of the essential elements of the Reservation water right, including the *amount* of the right, were necessarily adjudicated and determined in *Orr Ditch* and are therefore binding upon the United States and the Tribe in this action. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Furthermore, the trend of modern preclusion doctrine is toward limiting a litigant to one full, fair opportunity to

litigate a disputed matter in an adversarial proceeding which provides ample incentive to litigate it to the hilt. *Id.* Examples of this trend include non-mutual claim preclusion, expanded notions of privity, and issue preclusion of previously admitted, but unlitigated, issues essential to a prior judgment. *See* cases cited at pp. 37-41, *infra*. Analysis of the nature of comprehensive water right adjudications leads inescapably to the conclusion that in such cases, based upon incentive, opportunity to litigate, the justified expectations of all involved, and the need for certainty and settled rules of property, the determination of essential issues should be accorded finality regardless of whether they were "actually litigated" to final conclusion.

Finally, the Ninth Circuit's holding that the Secretary of the Interior is without authority to settle disputed Indian property rights under 25 U.S.C. Sections 2 and 9 should be rejected. Those statutes empower the Secretary to manage Indian affairs, a power which, by necessity, encompasses the power to litigate, and therefore to control and to settle such litigation. *See* cases cited at pp. 45-46, *infra*. Otherwise, all property management decisions of the Secretary would be opened up to serious challenge and Congress would be required to resume day-to-day oversight of Secretarial action. The Ninth Circuit's reliance on *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), for this interpretation, which renders 25 U.S.C. Sections 2 and 9 nullities, is misplaced. The court's reasoning should therefore be rejected.

ARGUMENT

I

THE PRINCIPLES OF RES JUDICATA/COLLATERAL ESTOPPEL BAR THE CLAIM OF THE UNITED STATES AND THE TRIBE TO ADDITIONAL TRUCKEE RIVER WATERS

The issue before the Ninth Circuit was whether the United States' dual representation of competing water claims in *Orr Ditch* constituted a denial of due process so as to permit the Tribe and the United States to avoid the bar of res judicata. The Ninth Circuit found that even if the government's representation of the Tribe had been inadequate, the principles of res judicata applied to preclude a claim for additional water not only against the *Orr Ditch* defendants and their successors, but also against subsequent appropriators who were complete strangers to the prior action.

This application of res judicata was based on the court's sound understanding of the importance of the policies and purposes underlying the doctrine, and of the importance of finality in comprehensive water right adjudications:

> Res judicata serves important policies. It fosters reliance on judicial decrees, eliminates expense to parties, conserves judicial resources, and minimizes the possibility of inconsistent results.... There are hardly maxims "more firmly established or of more value in the administration of justice, than those designed to prevent repetitious relitigation." . . . These policies apply with special force when titles to real property are involved.... In recent years both Congress and the Supreme Court have recognized that finality in water adjudications cannot be attained when reserved rights remain unsettled. (Citations omitted.)

App. A-47-48.

Because of the strong public policy favoring finality in litigation, *Montana v. United States,* 440 U.S. 147, 153-154 (1979); *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948), particularly in matters concerning real property, *United States v. Title Insurance and Trust Co.,* 265 U.S. 472, 486-487 (1924), the widespread notice of the *Orr Ditch* action, the repeated opportunities afforded interested parties to present their claims, the clear adversity between the United States and the defendants, and the heavy reliance which the United States intended to, and did, induce on the finality and comprehensiveness of the *Orr Ditch* decree, the Ninth Circuit held that the decree protects all of the present users of Truckee River water, whether parties, privies, or complete strangers to the *Orr Ditch* litigation—All users, that is, *except the Newlands farmers,* who acquired their rights from the United States.

While recognizing the inherent antagonism of the Newlands Project water right and the Reservation water right, App. A-69, the court held that that antagonism was not "explicitly established on the record, by pleadings," so no adversity existed sufficient to provide finality as between the two decreed water rights. App. A-50-55.

The Ninth Circuit's holding makes no sense in the context of a comprehensive water adjudication, illogically discriminates between non-parties and privies to the prior litigation in favor of non-parties, and makes it virtually impossible ever to obtain a final, binding decree quantifying the United States' reserved rights.

A. Pleading Adversity Is Unnecessary Where, As Here, Factual Adversity Is Established By The Record

The requirement imposed by the Ninth Circuit, "that adversity be explicitly established on the record, by plead-

ings," App. A-55, represents an elevation of form over substance which this Court long ago rejected. As this Court held in *Chicago, Rock Island and Pacific Railway Co. v. Schendel*, 270 U.S. 611, 615 (1926), with respect to the adversity requirement: "[i]t is elementary, of course, that, in any judicial proceeding, the arrangement of the parties on the record, so long as they are adverse, . . . is of no consequence." 270 U.S. at 615; *compare Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975). The determination of adversity for purposes of res judicata, then, is founded upon an analysis of the *relationship* of the parties rather than on their *alignment* in the pleadings.

While the United States appeared as the only named plaintiff in the caption of the *Orr Ditch* pleadings, in fact it had no separate right of its own to vindicate in the litigation, but only the rights beneficially belonging to the Newlands farmers and to the Tribe. Conversely, while neither the Tribe nor the Newlands farmers were named in the caption both were, functionally, the real parties in interest with separate rights of distinctive origin and dimension.

The actual adversity of the Reservation and Newlands rights during *Orr Ditch* is amply demonstrated by the negotiations leading up to the settlement of the case. *See* App. A-102. By that time a separate entity, TCID, had been formed which could, and did, independently advance the interests of the Newlands farmers. Exh. B-492, RT 375-379. It opposed the government attorney's suggestion that water for irrigation of an additional 19,000 acres of Reservation lands be included in the Reservation's water right, Exhs. U-265, 266, RT 1047, 1059, and negotiated directly with the Bureau of Indian Affairs concerning that Bureau's efforts to expand the Reservation's water right. Exh. B-316, RT 453-459; Exh. B-318, RT 9162; Exh. B-322, RT 461; Exh. U-293, RT 1047-1059. The United States Attorney

and the Bureau of Reclamation did not participate in the negotiations and took no position concerning the substance of the settlement agreement. Exh. B-337, p. 2, RT 464-466. In fact, the Commissioner of Reclamation specifically directed TCID and the Office of Indian Affairs to negotiate directly with each other concerning the extent of the Reservation right. JA 465-466, 469, RT 440-441, 9162.

During these negotiations the Bureau of Indian Affairs sought increased acreage and water duty for the Reservation. Exh. B-299, RT 446; Exh. U-277, RT 1047, 1059; Exh. A-461, RT 4583. Although TCID resisted the increased water allocation, the United States made it a precondition to execution of the settlement agreement, and TCID finally agreed. Exhs. U-293-296, RT 1047, 1059; Exh. A-467, RT 4583; Exh. G-29, RT 332-333; Exh. B-316, RT 453-454; Exh. B-337, RT 464-466. The Truckee River Agreement was then signed by the United States *and* by TCID. Exh. B-499, RT 385. The Agreement expressly provided that the right which adversarial negotiation had thus won for the Reservation was, as was the Agreement itself, to be incorporated into the *Orr Ditch* Final Decree. *Id.*

After construction of the reservoir provided for in the settlement, a motion was made in the *Orr Ditch* case for entry of a final decree expressly incorporating the Truckee River Agreement. TCID's own attorney signed the motion for entry of final decree on TCID's behalf, and participated on TCID's behalf in the oral argument of the motion. Exh. B-512, RT 406; Exh. B-515, pp. 1, 9-10, RT 408.

The separate statement and litigation of the two federal claims, the expectation of finality for each claim, and the separate representation in arm's-length negotiation for the settlement of the two claims *inter se* clearly provided sufficient factual adversity to bind the real parties in inter-

est *inter se,* and notice to those involved in the litigation that such a binding effect was intended. "Pleading adversity" would have added nothing.

B. Adversity Of All Claims Is Inherent In Comprehensive Water Rights Adjudications

In the arid Western United States, including Nevada, the indispensability and scarcity of water have given rise to rules of water rights which differ from those applied in the Eastern United States. The doctrine of prior appropriation, designed to maximize efficient and productive use of this scarce resource, provides that he who first takes control of water and applies it to beneficial use has a paramount right to do so which must be satisfied before any subsequent appropriator may take water. The principle of "first in time, first in right" applies regardless of the user's location on the stream, the location of his place of use, or the purpose to which he puts the water. The factors defining and delimiting the right are, *inter alia*: (1) the priority date of the right; (2) the amount of the right; (3) the season during which the appropriator may take water from the stream; and (4) the purpose to which the water may be put.[11] 6 Clark *Waters and Water Rights* § 513.1 at 302 (1972); *see also* 5 *id.* § 409; JA 294, 300, 308-309, RT 244-246.

The distinctiveness of these characteristics means that individual water rights are neither cumulative nor fungible. They are necessarily discrete by virtue of their priorities. If a water user wishes to increase the amount of water to which he is entitled, or to increase the season during which he may take water, for example, he must

11. While the first three limits of the right cannot be altered once the right is initiated, the purpose of use may be changed later, providing no other water user will be injured by the change.

establish a *separate* right to do so, and that new, incremental right will, of necessity, have a different priority date and amount than the prior right. As to this additional water the appropriator stands as a subsequent, or junior, appropriator even as to himself. His own and all other prior rights must be satisfied before the additional water can be taken.[12]

The other major source of water rights in the Western United States is the doctrine of federally reserved water rights, the *Winters* doctrine. The *Winters* doctrine right was first recognized by this Court in 1908,[13] but its nature and dimensions continue to emerge even today. It has been clear from the outset however, that at least two defining contours of the right resemble appropriative rights: A priority date, which corresponds to the date the particular federal reservation to which the right is appurtenant was established, and an amount of entitlement. Thus, in a comprehensive water adjudication in which all water rights are quantified, *Winters* doctrine claims and issues are, to this degree, functionally identical to appropriative rights.

In denying finality only to the rights decreed for the Newlands Project farmers, the Ninth Circuit treated the separately decreed and distinct Reservation right and Newlands right as if they were merely fungible portions of an homogeneous res which could be apportioned and reapportioned at will. This treatment ignores the fundamental nature of Western water rights and of comprehensive adjudications to settle such rights.

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12. In 1902, when Congress enacted the federal Reclamation Act authorizing federally assisted water development projects in the Western United States, it expressly endorsed and adopted the Western States' rule of prior appropriation as the rule governing water rights for reclamation projects. 43 U.S.C. § 383.

13. *See* note 1, *supra*.

As a result of the application of the principle of prior appropriation, water right claims asserted in a comprehensive water right adjudication are inherently and necessarily adverse, regardless of the arrangement of the parties on the record. The Idaho Supreme Court recognized this fundamental fact in *Morgan v. Udy*, 58 Ida. 670, 79 P.2d 295 (1938), and held a prior comprehensive water right adjudication to be res judicata in a later case between former co-parties, despite a plea of lack of adversity:

> Every claimant of the water of either stream, it matters not whether it be at the upper or lower end of either, or after the junction of the two, is interested in a final adjudication of all the claimants of all the waters that flow to the claimants at the lower end of the stream after its junction. In other words, in my view of the question presented by the demurrer, it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.

58 Ida. at 681, 79 P.2d at 298.

Both the court and the parties in the *Orr Ditch* litigation recognized that comprehensive water adjudications are *sui generis* in that they necessarily involve adversity between each and every party, however denominated, *and for each and every claim of right*. The United States expressly so stated in a memorandum to the court at the time. Exh. B-467, RT 356-357. And, in order that all parties, co-parties as well as formal adversaries, might be bound as to all other parties, the United States took procedural steps in the *Orr Ditch* case to formally create a record which would support the final comprehensive decree it sought to achieve. Exh. B-466, RT 355-356. In describing to the court the necessity of determining each claim relative to each

other claim, the United States Attorney emphasized the interlocking nature of water rights on a stream and the inherent power of a court of equity "to determine *each of these adverse, but contingent and interdependent, rights.*" (Emphasis added.) JA 288, RT 238; *see also* JA 294, 300, 308-309, RT 244-246.

The United States Attorney further explained that where statutory stream adjudications are not available quiet title suits replace them functionally, and indicated his belief that equity would not permit any "technicality or deficiency in pleadings" to jeopardize the comprehensiveness and finality of the resulting decree, not as to each party, but as to each *"user"* of water. JA 292, RT 238. The separate allegation in the *Orr Ditch* complaint of the Tribe's right and the Newlands right is consistent with this understanding.

Since, as has been demonstrated, the purpose of a comprehensive stream adjudication is to allocate *finally* a finite resource between competing claims whose total often exceeds the available supply, all parties have a consummate incentive to maximize *each* of their claims and to vigorously contest all claims with earlier priorities. Under the Western system, where priorities are established by date, it makes no sense to assume that a party with two claims would hold back from fully litigating the earlier, senior claim with a more certain supply, while harboring a secret intention to satisfy its purposes from a later, junior water right with far less assurance of adequate supply. But this is exactly what the Ninth Circuit's holding assumes.

That assumption necessarily presupposes that government officials deliberately "held back" from asserting the largest possible Reservation water right because of an undisclosed intention to invade the Newlands right later if any supplemental water for the Reservation was needed.

Such intent is contrary to the stated intentions of those in charge of the litigation at that time, JA 269-270, 273-274, 276-277, RT 248-249, 1042-1059, and makes no sense in the context of a comprehensive adjudication. Most importantly, this assumption cavalierly ignores one of the express purposes for which the United States initiated the *Orr Ditch* litigation—to ascertain how much water could be diverted for the Newlands Project. JA 278-281, 411, RT 1042, 1045, 1059, 422, 9162. This purpose would have been utterly defeated if the Newlands water right were subject to later invasion for other governmental purposes. Given the arm's length negotiations undertaken by the United States with TCID to define the limits of the Reservation right and to incorporate the resulting agreement in a court decree, any secret ambition later to expand that right to the detriment of the Newlands farmers would amount to misrepresentation and fraud.[14] The Ninth Circuit's premise of a government intention in *Orr Ditch* to leave undetermined the respective entitlements of the Reservation and the Newlands Project *inter se* thus ignores the fundamental nature of Western water rights, flies in the face of logic and belies the actual conduct by the United States of the *Orr Ditch* case.

The Ninth Circuit adopted the illogical premise discussed above in order to avoid finding that the United States had simultaneously represented two adverse claims in *Orr Ditch*. App. A-52, 53. It apparently felt that such simultaneous representation of the two federal water rights determined in *Orr Ditch* would necessarily have constituted a violation of the Tribe's due process rights, and subjected the entire decree to relitigation.

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14. Yet this Court has scrupulously avoided attributing such nefarious purposes to the government acting in its representative capacity. *See United States v. California & O. Land Co.*, 192 U.S. 355, 360 (1904).

But this is not the case. Before such a violation could be found, the record would have to show that an actual conflict between the rights being claimed for the Reservation and those being claimed for the Newlands Project adversely affected the assertion and litigation of the Reservation right. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

The record does not support any such finding. There is no evidence that the adversity of interests between the Reservation claim and the Newlands claim affected any decisions of either the Office of Indian Affairs, the Bureau of Reclamation, or the United States Department of Justice attorneys concerning the priority date or amount of water to be asserted for the Reservation. To the contrary, it appears that the Office of Indian Affairs was consulted about and approved the formulation of the Reservation claim, which was fully sustained by the Final Decree. JA 363, 441, RT 304, 1046, 1059.

The incentive to litigate both claims to the hilt, the involvement of the Bureau of Indian Affairs in framing the Reservation claim, the lack of involvement of the Bureau of Reclamation and the lack of any evidence showing that the Reservation's claim was not fully litigated in the legal context of the time,[15] all negate any inference of a due process violation arising from the government's representation of both claims.

Finally, there is no reasonable basis for the Ninth Circuit's implicit assumption that any additional quantum of adversity would have been added to the proceedings by the filing of a pleading expressly establishing adversity between the two claims. As discussed above and as recog-

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15. Not until 1963 did this Court recognize reserved rights for executive order reservations, *Arizona v. California* 373 U.S. 546 (1963), and only in 1976 did it recognize fishery uses as valid purposes under the reserved right doctrine. *Cappaert v. United States*, 426 U.S. 128 (1976).

nized by the Ninth Circuit itself, mutual adversity of claims is inherent in comprehensive water right adjudications. App. A-51.

In view of the exhaustive nature of the challenge mounted by the *Orr Ditch* private defendants, JA 366-375, RT 370; Exhs. B-480-490, RT 368-374; Exh. B-491, RT 375; Exh. B-515, RT 408, it is inconceivable that explicitly pleading the adversity of the Newlands claim would have heightened the controversy concerning the claimed Reservation right. It would merely have been superfluous. Conversely, no amount of "pleading adversity" would have sharpened the controversy concerning the Newlands right. Certainly the Tribe and other appropriators with earlier priorities had no stake in the amount decreed the Project, except as it might have affected their plans for future (and therefore junior) appropriations. Furthermore, the Newlands claim was in fact actually contested, litigated, and upheld. JA 408, RT 235; Exh. A-99002, pp. 9-10, RT 231-232; App. A-233-236, A-245.

C. The Ninth Circuit's Requirement Of Explicit Adversity On The Pleadings Threatens The Finality Of Comprehensive Water Right Adjudications By Establishing An Impossible Standard For The Representation Of Multiple Interests By The United States.

The scarcity and indispensability of water in the Western United States have combined to create a compelling need for certainty in water rights. The "pernicious effects" of uncertainty include inhibition of long-range planning and economic development, inefficient use and allocation of the resource, a significant potential for economic and social disruption, and recurrent costly litigation.[16]

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16. *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 355, 356 n. 11, 599 P.2d 656, 666 n. 11 (1979). *See GAO Report, supra* note 9, at 51; *One-Third of the Nation's Land*, Report to the President and the Congress by the Public Land Law Commission at 144 (1970).

A major source of such uncertainty is the existence of reserved water rights for federal lands which, as this Court has observed, "form brightly colored swaths" across the maps of the Western States. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). Many federal reservations were established early in the settlement of the West and thus their water rights have early priority dates. Because reserved rights are not established by use or lost by non-use, the amount of such rights is largely unknown and the potential for economic and social dislocation, once these rights are exercised, is correspondingly great. And, because of economic constraints and the potential for future population increase, many, if not most, Indian reserved rights have not yet been fully utilized. Finally, the scope and extent of rights under the *Winters* doctrine have not been definitively established, even today, but continue to emerge with successive court decisions.

Authorities which have examined the questions and problems created by the uncertainty surrounding federal reserved rights in the West have uniformly recommended quantification of those rights, either through negotiation[17] or litigation, as the solution. *GAO Report, supra* note 9, at vi, 70, 71. Ironically, the very sort of adjudication and quantification of Indian water rights which the government undertook in *Orr Ditch* has been viewed as the best way to prevent future Reservation/Reclamation conflicts similar to those which have arisen throughout the West in

17. The Ninth Circuit's determination that the Secretary of the Interior is not authorized by law to enter into water right settlement agreements would preclude quantification by negotiation, the preferred procedure, without specific Congressional approval of each settlement agreement.

the past. *Cf. Water Policies for the Future,* Final Report to the President and Congress of the United States by the National Water Commission, Recommendation No. 14-2 at 478 (June 1973).

The Ninth Circuit's decision below, however, would effectively negate the possibility for such quantification given the nature and extent of federal reservations in the West. Because of the ubiquitousness of federal landholdings, the existence of multiple federal water right claims on virtually any stream system in the Western States is unavoidable. In TCID's petition for certiorari a canvas of only recent cases produced six such instances; *amicus curiae* State of New Mexico, in its supporting brief, identified at least four others now pending in that state alone.

The Ninth Circuit's decision would require explicit adversity on the pleadings in order to bind federal claims *inter se.* But, since all reserved water rights are held by the United States, no mechanism existed or exists by which to establish explicit pleading adversity of such claims. Even if federal claims could be pled adversely, private defendants would be "on notice" of the government's dual representation, which the Ninth Circuit assumes to be inadequate and improper *per se* and the government would thus be left free to relitigate its claims against all parties. Either way, the Ninth Circuit's decision dooms any attempt to comprehensively and finally quantify federal reserved water right claims.

The dilemma spawned by the Ninth Circuit cannot be avoided by intervention of the Indian Tribes affected, as that court seems to suggest. In the first place, such intervention would not relieve the government of its duty to represent the Tribe's interest, nor transfer control of the

litigation of that interest to the Tribe. *Pueblo of Picuris v. Abeyta,* 50 F.2d 12 (10th Cir. 1931). Control of litigation of the Indian interest must remain with the United States so long as there is any vitality to the concept of the United States' guardianship over the Indians. *Id.* And, under the Ninth Circuit's express holding, unless the United States limits or relinquishes control of representation of the Tribe's interest, the Tribe's participation could not satisfy the requirement of adversity on the pleadings. App. A-55.

As to many of its reserved water rights claims, there is no potential intervenor who could join as a co-party with the United States, let alone become adverse on the pleadings. As to reclamation projects, national forests, military posts, national parks, wildlife refuges, and many other types of federal reservations, no identifiable non-federal person or group could or should assume the burden of representing the federal interest; certainly the United States should not relinquish that responsibility. Thus, the United States is left necessarily representing multiple competing interests which cannot be pled adversely, yet quantification and certainty of these water rights is no less necessary for both public and private planning purposes.

The Ninth Circuit's imposition of a hypertechnical and unavoidable bar of "explicit pleading adversity" thus utterly frustrates the "clear federal policy" of avoiding piecemeal adjudication of water rights in a river system. *Colorado River Water Conser. Dist. v. United States,* 424 U.S. 800, 819 (1976).

D. The Ninth Circuit's Decision Ignores Principles Of Modern Preclusion Doctrine Which Prevent Relitigation Of Disputes

The way out of the conundrum imposed by the Ninth Circuit is to recognize that in comprehensive water rights

litigation, the issue and the claim are coextensive, and the essential elements of each claim of right are necessarily determined in a fully adversary context.

1. COLLATERAL ESTOPPEL PREVENTS RELITIGATION OF THE AMOUNT OF THE RESERVATION'S WINTERS DOCTRINE ENTITLEMENT

The *Restatement (Second) of Judgments* acknowledges that the definition of "issue" must remain flexible, depending for its content on the procedural opportunities and incentives to litigate the matter in the prior action. *Restatement (Second) of Judgments* at 8-10; Intro. at Intro. Note to § 27 at 249-250 (1982) [hereinafter "Restatement"]. Court decisions have tailored the definition of issue to respond to the nature of the interest litigated—"broad in cases involving real property and status, where the need for stability is clearest, and narrow in cases where there is a primary interest in encouraging settlement and discouraging appeals." *Id.* at 250; *see also United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924).

Delineating the scope of an issue thus requires the balancing of competing interests—"on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute." *Restatement, supra,* at 252. The *Restatement* suggests criteria for determining whether the issue involved is the same as that previously determined: (1) The degree of overlap in the evidence; (2) the applicability of the same rule of law; (3) the comparability of discovery and other procedural opportunities; and (4) the degree of similarity in the claims advanced. *Id.* § 27, Comment c at 252.

By these tests, the courts below should have concluded that the issue involved in this action, quantity of entitlement,

is identical to the issue involved in *Orr Ditch*. By conscious effort of the parties and the court the procedural opportunities and available discovery in *Orr Ditch* were substantially the same as those available in this action. App. A-101, A-104. Both the claim made and the applicable rule of law were identical to those advanced herein: a *Winters* doctrine right to water for the Pyramid Lake Reservation. App. A-104. And, as both the District Court and the Ninth Circuit noted, there is a substantial overlap of evidence between the two lawsuits. App. A-32, A-104.

Since the determination of an issue, once litigated, binds the party in any subsequent action, the simple recognition that the *Orr Ditch* decree determined the quantity of the Reservation's entitlement satisfies both the need for adversarial litigation of disputed issues and the need for settled rules governing property interests. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

2. MODERN PRECLUSION PRINCIPLES PREVENT RELITIGATION OF DISPUTES WHICH PARTIES WITH INCENTIVE HAVE HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE

The impulse toward eliminating repetitive litigation has led courts to abandon many of the absolutist and hypertechnical boundaries which have traditionally defined the outer reaches of preclusionary doctrine in favor of a more pragmatic analysis of the factual circumstances surrounding individual cases and types of litigation. The most striking examples are *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), in which this Court discarded technical requirements which

had previously kept the doctrine of issue preclusion within artifically narrow boundaries.[18]

The fundamental premise underlying the modern preclusion doctrine which this Court has enunciated is that a litigant should be limited to one full and fair opportunity to litigate a disputed matter in an adversarial proceeding which provides adequate incentive to litigate it "to the hilt." *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Allen v. McCurry*, 449 U.S. 90 (1980); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). This theme resounds throughout a number of different applications.

While black letter common law once held that a party had as many claims as there were potential defendants to pursue, *see Restatement* § 49 at 34; 18 Wright, Miller & Cooper. *Federal Practice and Procedure; Jurisdiction* § 4407 at 53 (1981), some courts now hold a party precluded from relitigating claims which were previously asserted against different defendants, even though no issues in the prior action were litigated or determined.

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18. Interestingly, many of the factors influencing expansion of preclusion in recent Supreme Court cases abound in cases involving comprehensive water right adjudications. In *Blonder-Tongue* and *Parklane Hosiery*, for example, the "staggering expense and typical length" of patent cases was noted. 439 U.S. at n. 10. And in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 403 (1981) (Blackmun, J., concurring), the special need for preclusion in "complex multiparty actions" was cited. Comprehensive water adjudications, by their very nature, are complex multiparty actions of staggering expense and length. In *Orr Ditch* there were over 700 named parties and it took twelve years for the case to be tried to a tentative determination. The instant action has already been pending eight years and involves over 17,000 defendants. Just through 1978, the federal government alone had spent $3.5 million on prosecution of the instant action, not including attorneys fees and travel costs. *GAO Report, supra* note 9, at 36.

This trend is clearly illustrated by *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972), in which the plaintiff filed suit against certain defendants, alleging that they had conspired to his detriment with other named persons. He later asked to withdraw his action, which was dismissed with prejudice, and he subsequently filed a second suit against the originally identified non-defendant conspirators alleging the same conspiracy. The Court of Appeals refused to apply collateral estoppel because no issues had been determined in the prior action. But it held that, because of the close relationship of the two sets of defendants and the substantial identity of the claim made, the plaintiff was nonetheless precluded from litigating his claim.

Cambist Films, Inc. v. Duggan, 475 F.2d 887 (3d Cir. 1973), is even closer to the case at bench. In *Cambist*, allegedly pornographic films had been seized by law enforcement officials. Cambist sued law enforcement officers, seeking equitable relief in the form of the return of its films and an injunction against further seizures. Cambist prevailed, and then instituted a second suit naming additional defendants and seeking damages. The court held Cambist precluded from seeking additional relief *as to all named defendants*, reasoning that the same underlying claim was being presented, that the newly named defendants were closely related to the defendants in the prior action, and that plaintiff had already had its "fair day" in court at which it could reasonably have been expected and required to present "all matters, legal and/or equitable, in support or defense of that cause of action." *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 891 (3d Cir. 1973) (Van Dusen, J., concurring), *quoting* B. J. Moore *Federal Practice* § 0.410[1] (2d ed. 1965); *see also Fowler v. Wolff*, 479 F.2d 338 (8th Cir. 1973); *Ruskay v. Jensen*, 342 F.Supp. 264 (S.D.N.Y. 1972); *County of Lancaster v. Philadelphia Electric Co.*, 386 F.Supp. 934 (E.D.Pa. 1975).

Expanded notions of privity and virtual representation also represent devices which courts have used to prevent repetitive litigation where issue preclusion is inapplicable. *See, e.g., Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975); *Gerrard v. Larsen,* 517 F.2d 1127 (8th Cir. 1975); *Midcontinent Broadcasting v. Dresser Industries,* 669 F.2d 564 (8th Cir. 1982). *See also Note, Collateral Estoppel of Nonparties,* 87 Harv. L.Rev. 1485, 1494-1495, n. 66 (1974).[19]

Even if the Tribe's asserted "fishery right" were not subsumed in and litigated as part of the amount of entitlement under the *Winters* doctrine, there is authority supporting preclusion of its litigation in this action. The traditional requirement that an issue be "actually litigated" in the prior action has been subject to criticism and substantial erosion in situations in which the litigant has already had a full and fair opportunity to litigate the issue fully, and can be charged with the reasonable expectation that it will be finally determined as a result of the litigation. *See* Vestal, *The Restatement (Second) of Judgments: "A Modest Dissent,"* 66 Cornell L. Rev. 464 (1981). For example, this Court has accorded preclusion to prevent relitigation of an issue necessary to support a prior default judgment. *Last Chance Mining Co. v. Tyler Mining Co.,* 157 U.S. 683 (1895). Issue preclusion has also been accorded following consent decrees or settlements where it is apparent that the parties intended the issue to be finally resolved even though it was not actually litigated. *See Nashville, Chattanooga, & St. Louis Ry. Co. v. United States,* 113 U.S.

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19. This expansive "privity" concept may constitute an alternative rationale for the District Court's finding that the defendants in this case, including the Newlands farmers and the subsequent appropriators, were *in privity with* the defendants in *Orr Ditch,* since the interest of all junior appropriators in that action was identical: To minimize prior entitlements.

261 (1885); *Siegel v. National Periodical Pub., Inc.*, 508 F.2d 909 (2d Cir. 1974); *Sampson v. Ampex Corp.*, 478 F.2d 339 (2d Cir. 1973). Finally, issue preclusion is frequently afforded as to essential elements of a crime where a guilty plea has been entered and the issues have thus not been litigated. *See, e.g., Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975); *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974); *Metros v. United States Dist. Court for Dist. of Colo.*, 441 F.2d 313 (10th Cir. 1971); *United States v. Rubin*, 243 F.2d 900 (7th Cir. 1957).

The common thread in all of the situations cited above is the advancement of the goal of avoiding litigation of an issue which was necessarily conceded in prior litigation, where the precluded party had ample opportunity and incentive to litigate it.[20] The focus thus is properly shifted from the application of mechanical rules to an analysis of fairness to the parties given the nature of the prior action. The analysis, then, ultimately turns on the degree of incentive to litigate and the reasonable expectations and motivations of the parties.

A very clear example of this analysis is seen in *Prosise v. Haring*, 667 F.2d 1133 (4th Cir.), *cert. granted*, 51 U.S.L.W. 3287 (1982), in which the court was called upon to decide whether a guilty plea in a criminal action should preclude the defendant from later litigating the constitutionality of evidence seizure preceding his arrest. The court

20. Whether the preclusive effect is denominated "evidentiary," "estoppel in pais" or "res judicata" should not alter the analytic approach nor the generally applicable rule: Where an essential element of a claim or defense is admitted, rather than litigated, in circumstances where the stakes are high enough to insure ample incentive to litigate, extending additional opportunities to litigate the same issue is unwarranted.

reasoned that a defendant's incentive to litigate the constitutional issues would vary widely from case to case depending on the amount and sufficiency of clearly untainted evidence available to support his prosecution and conviction. The court concluded that the case-by-case factual determinations of incentive necessary to justify a preclusion defense would defeat any judicial economies which might be afforded by its potential availability. Because of this variation in incentive to litigate the evidentiary issues, the court adopted a general rule of non-preclusion in such cases.

3. IN COMPREHENSIVE WATER RIGHT ADJUDICATIONS, SUCH AS ORR DITCH, ALL PARTIES HAVE AMPLE INCENTIVE TO LITIGATE EACH CLAIM TO THE HILT

Applied to comprehensive water right adjudications, however, the Prosise analysis compels the opposite conclusion. Such actions, as the Ninth Circuit recognized, are designed "to adjudicate all rights and claims" to the waters of a particular stream system, and they approximate *in rem* actions. App. A-49. Because the allocations made are expected to be comprehensive and final "it [can] justly be supposed that the parties [will] assert all their claims and defenses." App. A-49. Since claims not asserted can justifiably be expected to be lost there is maximum incentive to assert both the greatest amount of entitlement and the earliest priority for *each claim*.[21]

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21. The present case presents a striking example of a situation in which, contrary to the Ninth Circuit's implicit assumption, the parties had a distinct *dis*incentive to hold back from fully asserting their claims. While the Ninth Circuit's holding would permit later invasion of the Newlands claim for the benefit of the Reservation, it could not, because of the private defendants' intervening adjudicated rights, preserve the early priority of any Reservation entitlement not asserted in the prior action. Thus any decision on the part of a litigant to "reserve" litigating its claims *inter se* amounts to a *conscious decision to sacrifice* the priority of the earlier claim to the extent it is not asserted.

(cont'd on p. 42)

Given the incentives and expectations of the parties in a comprehensive stream adjudication, to require that issues essential to a claim be "actually litigated" before issue preclusion can apply serves no useful purpose. To the contrary, it frustrates the very purpose of such litigation by permitting unnecessary "second chances," thus prolonging the uncertainty which the litigation and the preclusion doctrines were designed to cure.

II

THE NINTH CIRCUIT MISAPPLIES A RULING OF THIS COURT IN HOLDING THAT THE SECRETARY OF THE INTERIOR WAS NOT AUTHORIZED TO NEGOTIATE AND EXECUTE AN OUT OF COURT SETTLEMENT OF DISPUTED INDIAN WATER RIGHTS

The *Orr Ditch* Final Decree, which TCID asserts as a preclusionary bar to the instant litigation, was a consent decree. It incorporated verbatim the provisions of the Truckee River Agreement which settled the water rights of the various parties to the *Orr Ditch* litigation. App. A-102, A-159-160, A-231-233, A-245. The Truckee River Agreement was executed by the United States, TCID, and other major water users after extended negotiations during which TCID was independently represented, the Bureau of Reclamation took no position, and the United States actively negotiated only on behalf of the Indians. In fact, the United States succeeded in obtaining water for more Reservation lands and a higher applied water duty than had been previously determined by the Special Master. *Compare* Exh. 99002, p. 9

21. (cont'd.) In situations in which water supply is inadequate to meet all needs, as here, relinquishment of an early priority for a junior one inevitably carries with it the risk that the junior claim may never be satisfied due to lack of water availability. Curiously, the Ninth Circuit did not consider such a deliberate sacrifice (which it assumed the United States intended to make) to violate due process, even though it assumed that dual representation of inherently conflicting, though factually compatible, claims would do so *per se*.

with App. A-158-160; *See also* Exh. B-294, RT 442-444; Exh. U-277, RT 1047, 1059; Exh. A-467, RT 4583; Exh. G-29, RT 332-333; Exh. B-316, RT 453-454; Exhs. U-293, 294, 296, RT 1047, 1059; Exh. B-337, RT 464-466; Exh. B-339, RT 467; Exh. B-345, RT 472-473; Exh. B-349, RT 9162.

Because the Truckee River Agreement has vitality independent of the force of the *Orr Ditch* Final Decree, the Ninth Circuit found it necessary to disable it separately. In footnote 10 of its decision, the Ninth Circuit states:

> 10. The district court did not rest its holding directly on 25 U.S.C. §§ 2 and 9. However, the defendants urge that two cases interpreting those sections, *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) (*Ahtanum I*), and 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed. 2d 683 (1965) (*Ahtanum II*), provide alternative authority for the Secretary to extinguish Indian waters.
>
> Even if we agreed that the *Ahtanum* cases could be extended by analogy to this case, those cases have been modified by *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which was decided after *Ahtanum I* and before *Ahtanum II*. Under *Kake*, agreements between the government and non-Indians to alienate Indian property can only be valid if they are needed "to implement specific laws" other than 25 U.S.C. §§ 2 and 9. To be valid, then, the Secretary's conduct in *Orr Ditch* must find its basic authority elsewhere.

App. A-29 n. 10.

In *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the Ninth Circuit squarely held that the Secretary of the Interior,

under 25 U.S.C. Sections 2 and 9, had authority to manage Indian affairs and all matters arising out of Indian relations by enforcing an allocation agreement in settlement of a dispute arising out of an action brought by a non-Indian settler to determine rights to the flow of Ahtanum Creek which bordered an Indian Reservation. The agreement, executed by a delegee of the Secretary of the Interior on behalf of the Indians, allocated twenty-five percent of the flow of the creek to the Indians and seventy-five percent to the settlers.

Some 40 years after the execution of this agreement the United States sued the non-Indian diverters of Ahtanum Creek for an adjudication of the Indians' water rights. The District Court dismissed the complaint, holding that the prior agreement barred the United States from claiming more than the twenty-five percent of the flow which had been guaranteed the Indians. The Ninth Circuit was faced squarely with the precise question it faced again in the instant litigation: Was the Secretary authorized to enter into such an out of court settlement? The court held that he was, and found the agreement valid. It cited 25 U.S.C. Section 2 and reasoned:

> It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other.

236 F.2d at 335.

> It is the view of this court that it could not have been within the contemplation of Congress that the Secreary, vested as he was with the general power of super-

> vision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream.

236 F.2d at 336.

In holding that the power to resolve property disputes between the Secretary's Indian wards and non-Indians was "necessary" to the fulfillment of his property management responsibilities, the Ninth Circuit adhered to the analogous and supportive logic of decisions rendered under similar circumstances in the majority of federal and state jurisdictions. *See, e.g., Webb v. City of Meridian,* 195 So.2d 832 (1967); *Mullen v. Town of Louisburg,* 225 N.C. 53, 33 S.E.2d (1945). In innumerable cases, various courts have viewed the vesting of management and litigation powers in municipal corporations and other public agencies with property management responsibilities analogous to those of the Secretary under 25 U.S.C. Sections 2 and 9, as creative of a public trust. *See, e.g., Allen v. Hussey,* 101 Cal.App.2d 457, 225 P.2d 674 (1950); *Wagner v. City of Milwaukee,* 180 Wis. 640, 192 N.W. 994 (1923). Universally, a statutory grant either of the power to manage trust property, *see City of Logansport v. Dykeman,* 116 Ind. 15, 17 N.E. 587 (1888), or the power to sue is viewed as inherently or logically creative of a power to compromise or settle disputes involving the property and the assets of that public which is the beneficiary of the statutory trust.[22] Further, the power to sue

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22. *See, e.g., Blanchar v. City of Casper,* 81 F.2d 452 (10th Cir. 1936); *O'Connell v. Pacific Gas & Electric Co.,* 19 F.2d 460 (9th Cir. 1927); *Agnew v. Brall,* 124 Ill. 312, 16 N.E. 230 (1888); *The Town of Petersburg v. Mappin,* 14 Ill. 193 (1852); *Board of Com'rs. v. Blythe,* 163 La. 929, 113 So. 150 (1927); *Prout v. Inhabitants of Fire-Dist. of Town of Pittsfield,* 154 Mass. 450, 28 N.E. 679 (1891); *Oakman v. City of Eveleth,* 163 Minn. 100, 203 N.W. 514 (1925); *State v. Davis,* 11 S.D. 11, 75 N.W. 897 (1898); *McKennie v. Charlottesville & A. Ry. Co.,* 110 Va. 70, 65 S.E. 503 (1909); *Washburn County v. Thompson,* 99 Wis. 585, 75 N.W. 309 (1898).

carries with it the power to manage any suit instituted. *Pueblo of Picuris v. Abeyta*, 50 F.2d 12 (10th Cir. 1931); *see also Whitebird v. Eagle-Picher Company*, 390 F.2d 831, 834 (10th Cir. 1968), *citing, Mars v. McDougal*, 40 F.2d 247, 249 (10th Cir. 1930); *Commonwealth v. Southern Pac. Co.*, 134 Ky. 421, 120 S.W. 313 (1909). The only condition placed upon the exercise of this necessary complementary power to compromise is that the resolution of the issue in dispute be doubtful. *See Gering v. School Dist. No. 28, Cass County*, 76 Neb. 219, 107 N.W. 250 (1906). Moreover, once a public trustee has exercised its power to compromise or settle a dispute, that settlement is binding and the beneficiaries of the trust may attack the result only on such grounds as fraud, collusion, or bad faith. *See, e.g., Gogerty v. Coachella Valley Junior College Dist.* 57 Cal.2d 727, 371 P.2d 582 (1962); *Schaefer v. Berinstein*, 140 Cal.App.2d 278, 295 P.2d 113 (1956); *Shipp v. Rodes*, 219 Ky. 349, 293 S.W. 543 (1927); *Farnham v. City of Lincoln*, 75 Neb. 502, 106 N.W. 666 (1906).[23]

Under the holding of *Ahtanum* and the decisions of the courts cited above, then, the Truckee River Agreement is clearly valid and binding on the United States, regardless of the effect of the *Orr Ditch* Final Decree. The Ninth Circuit, however, has now repudiated its *Ahtanum* holding by completely misinterpreting this Court's decision in *Organ-*

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23. Neither in the pleadings filed in the instant action nor in the opinion of the Ninth Circuit Court of Appeals has it been suggested that the Truckee River Agreement was the product of fraud or collusion. In fact, the District Court found the negotiations were "arms-length and good faith." App. A-102. If, as the courts cited above have determined, the power to manage property and to sue or be sued is meaningless without a complementary power to compromise disputes and settle, negotiation and execution of the Truckee River Agreement must be seen as a permissible exercise of Secretarial power binding upon the beneficiaries of the trust administered by him—the Tribe.

ized Village of Kake v. Egan, 369 U.S. 60 (1962). According to the Ninth Circuit, the *Kake* holding permits Secretarial action to compromise claims or settle litigation only if such action is necessary to implement other specific laws. App. A-29, n. 10. Since the court was aware of no specific statute which expressly empowers the Secretary to compromise disputes involving Indian trust lands, it found that the Secretary is not authorized to do so. Such a far-reaching extension of *Kake*, which had nothing to do with the Secretary's property-management authority, but rather resolved a jurisdictional dispute between the Secretary and a state regulatory authority, would strip the Secretary of authority to deal with and manage that property at all.

Non-judicial dispute resolution is a necessary element of both property management and the trustee-ward relationship. The Ninth Circuit suggests that this procedure is merely the equivalent of "alienation." *Id.* Yet this conclusion completely ignores the fact that, where rights are uncertain, any consensual adjustment of a dispute may amount to "acquisition" as readily as to "alienation."

The Ninth Circuit's opinion curtailing the Secretary's management powers not only drastically limits this executive's future management capacity over trust property, it also unsettles, to an unknowable degree, established property interests which have been relied upon for generations. Under this view, even the consent of the affected Tribe could not cure the Secretary's lack of authority. *See* 25 U.S.C. § 476. Each dispute settlement or other property impacting managerial act not grounded in express statutory language, then, would require separate consideration and approval by Congress, which holds plenary power over Indian property. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). This requirement of action-by-action oversight

would result in a cumbersome and unwieldy management procedure more disadvantageous to the Tribe than to the trustee. Further, 25 U.S.C. Sections 2 and 9 would become meaningless; a statutory construction to be avoided. *See F.T.C. v. Manager, Retail Credit Co., Miami Br. Off.*, 515 F.2d 988, 994-995 (D.C. Cir. 1975). Finally, the Ninth Circuit's restrictive interpretation of these statutes is not even likely to enhance the protection of Tribal interests in light of the current access of tribal governing bodies to the decision-making process. *See* 25 U.S.C. § 461 *et seq.*

This Court can, by clarifying the holding of *Kake, supra*, assure the continued, orderly tribal property management by the Secretary which was intended by Congress when it enacted 25 U.S.C. Sections 2 and 9. Such action would also vindicate the reasonable expectations of the thousands of Newlands farmers and others throughout the West who, in reliance upon Secretarial authority to execute such settlement agreements, have expended countless hours and billions of dollars in settling the West.

CONCLUSION

The holding of the Ninth Circuit Court of Appeals is the product of misunderstanding both of the nature of comprehensive water adjudications and the preclusion doctrine, misinterpretation of a prior decision of this Court, and misconstruction of facts. This Court should, therefore, reject the holding of the Appellate Court and reinstate the *Orr Ditch* decree and the Truckee River Agreement as conclusive of the rights to the waters of the Truckee River thereby assuring continued stability of property rights throughout the Western States.

Respectfully Submitted,

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